APPENDIX

Constitutional Provision, Statutes and Rules Cited

Constitution of the United States
Fifth Amendment

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

28 U. S. C. 1291: *Final decisions of district courts.*

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts * * *

28 U. S. C. 1292(a): *Interlocutory decisions.*

> (1) The courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts * * * granting, continuing, modifying, refusing or dissolving injunctions * * *

28 U. S. C. 1339: *Postal matters.*

> The District Courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

15 U. S. C. 78aa: *Securities Exchange Act.*

> *Jurisdiction of offenses and suits.* Section 27. The district courts * * * shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

18 U. S. C. 401: *Power of court*:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as— * * *

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Civil Procedure

Rule 6. *Time.* * * *

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; * * *

Rule 7. *Pleadings Allowed; Form of Motions.* * * *

(b) MOTIONS AND OTHER PAPERS. * * *

(2) The rules applicable to signing, captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

Rule 11. *Signing of Pleadings.*

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in

his individual name, whose address shall be stated. * * * If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action, * * *

Rule 12. *Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.*

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, * * *

The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: * * *

(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply except * * *

Rule 55. *Default.*

(a) ENTRY. When a party against whom a judgment for affirmative relief has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

Rule 65. *Injunctions.* * * *

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security

by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. * * *

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; * * *

Rule 83. *Rules by District Courts.*

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules.

General Rules, U.S.D.C., S.D.N.Y.—Rule 5.

(a) The chief judge shall have charge of all matters relating to the discipline of members of the Bar. * * *

(b) The court may make an order in a disciplinary proceeding disbarring, suspending or censuring, or taking such other action as justice may require, with respect to a member of the Bar of this court * * *

(4) who is guilty of conduct unbecoming a member of the Bar of this court. Without limiting the generality of the foregoing, such misconduct shall be deemed to include fraud, deceit, malpractice, conduct prejudicial to the administration of justice, or violation of the canons of ethics of the American Bar Association or of the New York State Bar Association.

Rule 9.

(c) * * * (4) No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary.

Civil Rules, U.S.D.C., S.D.N.Y.—Rule 2.

The court, on motion or on its own initiative may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the court may make such orders in regard to non-compliance as are just, and among others the following: An order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

7 C.J.S. Section 16:

PROCEEDINGS in a suit by a person not entitled to practice are a nullity and the suit may be dismissed. If the cause has proceeded to judgment, the judgment is void and will be reversed. Briefs presented on appeal by persons not licensed to practice in the appellate courts will not be considered.

Order Striking From Calendar Motion for Preliminary Injunction, for the Appointment of a Receiver and for the Disqualification of Counsel

Tr. 96

U.S.D.C., S.D.N.Y.
Filed: November 13, 1963

This motion is stricken from the calendar without prejudice to renewal, pending decision on motions now before the Court. So ordered.

/s/ THOMAS F. CROAKE
U.S.D.J.

November 12, 1963

Order to Show Cause on Motion for Security

Tr. 25-27

U.S.D.C., S.D.N.Y.
Filed: October 31, 1963

* * * * *

ORDERED that pending the hearing and determination of this motion all proceedings herein be stayed; and it is further

ORDERED that the time of all defendants to answer or make any motion with respect to the complaint herein is extended until 10 days after the hearing and determination of this motion, or the posting of security if ordered by the Court; and it is further

* * * * *

/s/ THOMAS F. MURPHY
U.S.D.J.

Dated, New York, N. Y.
October 29, 1963

* * * * *

Memorandum Opinion on Motion for Security

Tr. 98-100

#29404
U.S.D.C., S.D.N.Y.
Filed November 18, 1963

(CAPTION) Civil Action No. 63-Civ-2924

CROAKE, *District Judge*

MEMORANDUM

By order to show cause, defendants have brought on a motion for an order directing plaintiff (a) to give security in the amount of $100,000 pursuant to Section 627 of the Business Corporations Law of the State of New York for expenses which may be incurred in this action, (b) to give security in the amount of $5,000 pursuant to Rule 2 of the Civil Rules of this court to the extent security is not required under said Section 627, and (c) for a stay of all proceedings herein until the posting of the required security.

In light of the fact that the complaint is inartfully drawn by the plaintiff who appears *pro se*, it is difficult to ascertain the nature of the three "counts" asserted therein. Without in any way passing on the validity of the complaint, the court infers that the first and third counts purport to allege claims in the nature of stockholder derivative actions based upon alleged violations of the Securities Act of 1933, the Securities Act of 1934, and regulations thereunder.

For the application of Section 627 of New York Business Corporation Law, defendants rely upon *Fielding* v. *Allen*, 181 F. 2d 163 (2d Cir. 1950) *cert. denied sub nom.*

Ogden Corporation v. *Fielding*, 340 U. S. 817 (1950). That case makes clear, however, that Section 627 may only be applied in a federal action brought under the diversity jurisdiction. As it appears that plaintiff and at least some of the defendants are residents of the State of New York, there is no diversity jurisdiction in this case. Accordingly, branch (a) of the motion will be denied.

In view of the nature and circumstances of this litigation, however, the court will grant branch (b) of the motion to the extent that plaintiff will be required to post security in the amount of $2,000. Branch (c) of the motion is also granted.

Settle order on notice.

/s/ Thomas F. Croake
U.S.D.J.

Dated: New York, New York
November 14, 1963

Counter-Order

Tr. 109-110

U.S.D.C., S.D.N.Y.
Filed: December 23, 1963

* * * * *

Ordered, that the motion for security for costs pursuant to Rule 2 of the Civil Rules of the Federal District Courts for the Southern and Eastern Districts of New York, is granted and said security is fixed in the sum of $2,000; and it is further

ORDERED, that plaintiff is directed to furnish said security in the amount of $2,000 by depositing cash or United States Government bonds having a face value of $2,000 with the Clerk of this Court, or by filing a bond in said amount which complies with the provisions of Rule 31 of the General Rules of the United States District Courts for the Southern and Eastern District of New York with the Clerk of this Court, and it is further

ORDERED, that until the filing of the security aforesaid, all proceedings on the part of the plaintiff are stayed, without prejudice to plaintiff's right to file a motion in the Motion Part of this Court to vacate such stay, and it is further

ORDERED, that if said security in the sum of $2,000 is not filed pursuant to the provisions of this order within 15 days, after the service of a copy of this order with a notice of entry thereof upon the plaintiff, the Clerk is directed to enter an order dismissing this action upon submission of an order based upon an affidavit of non-compliance with the terms of this order upon five days' notice to the plaintiff.

/s/ THOMAS F. CROAKE
U.S.D.J.

Dated: New York, N. Y.
December 23, 1963

Order Denying Resettlement of Counter-Order

Tr. 132

U.S.D.C., S.D.N.Y.
Filed: January 8, 1964

The within application for resettlement of an order of this court entered in this action December 23, 1963, is denied. Said order is not considered an appropriate one for interlocutory appeal within the requirements of 28 U. S. C. 1292(b). So ORDERED.

/s/ THOMAS F. CROAKE
U.S.D.J.

Dated: New York, N. Y.
January 7, 1964

Notice of Appeal From Counter-Order

Tr. 133

U.S.D.C., S.D.N.Y.
Filed: January 22, 1964

Notice is hereby given that William Leighton, plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the Counter-Order entered in this action on December 23, 1963 and filed herein on that same day.

/s/ WILLIAM LEIGHTON
Plaintiff pro se
249 West 11th Street
New York 14, N. Y.

Dated: January 22, 1964

Memorandum Opinion and Order

Tr. 120A

U.S.D.C., S.D.N.Y.
Filed: January 22, 1964

Branch (a) of the within motion to vacate a stay of proceedings contained in the order of this court, dated December 23, 1963, is denied. The only ground asserted therefor is that the defendants procured the stay by "fraud" in that they were then in default in answering the complaint. Defendants, however, had received an extension of time to answer until after plaintiff posted security.

For the same reasons, branch (b) of the motion seeking default judgments is denied. The remaining branches of the motion are also denied because the bringing thereof was in violation of the aforesaid stay.

So Ordered.

/s/ Thomas F. Croake
U.S.D.J.

Dated: New York, N. Y.
January 22, 1964

Order Denying Application for Stay to Post Security

Tr. 149

U.S.D.C., S.D.N.Y.
Filed: January 22, 1964

The within application for a stay pending disposition of motions before this court is denied. One of said motions has been denied in a memorandum endorsement filed simultaneously herewith. No sufficient reason appears in the moving papers for a stay pending the disposition of the motion allegedly returnable February 4, 1964.

So Ordered.

/s/ Thomas F. Croake
U.S.D.J.

Dated: New York, N. Y.
January 22, 1964

Memorandum Extending Plaintiff's Time

Tr. 217

U.S.D.C., S.D.N.Y.
Filed: January 24, 1964

The within proposed order is returned to the Clerk's office of this court unsigned. On 1-10-64 this Court orally extended the time of plaintiff to post security to and including 1-14-64.

/s/ Thomas F. Croake
U.S.D.J.

Dated: New York, N. Y.
January 24, 1964

Order, Judgment and Decree

Tr. 218-19

(CAPTION)

U.S.D.C., S.D.N.Y.
Filed: January 23, 1964

UPON the reading of the affidavits of Whitney North Seymour, Jr., sworn to on January 15, 1964, Joseph B. Gordon, sworn to on January 15, 1964, and of John J. O'Neill, sworn to on January 15, 1964, and the order of the Hon. Thomas F. Croake dated December 23, 1963, and in accordance with the directions contained in said order of December 23, 1963, providing for the dismissal of this action for failure to post security in amount of $2,000.00 and upon submission of affidavit of non-compliance and upon five days' notice, it is

ORDERED, ADJUDGED AND DECREED that the within action be and the same hereby is dismissed, without prejudice, however, to the rights, if any, of any member of the class (except the named plaintiff William Leighton) on behalf of whom plaintiff purportedly brought this action.

/S/ THOMAS F. CROAKE
U.S.D.J., United States District Court for the Southern District of New York

Dated: New York, N. Y.
January 23, 1964

Notice of Appeal From Orders

Tr. 259

(Caption) Civil Action No. 63-Civ-2924

U.S.D.C., S.D.N.Y.
Filed: February 20, 1964

Notice is hereby given that plaintiff William Leighton hereby appeals to the United States Court of Appeals for the Second Circuit from

(1) the Order, filed January 22, 1964 herein, denying plaintiff's motion for the entry of default judgments against the defendants and from all parts of such Order, and

(2) the further Order, filed January 22, 1964 herein, denying an application for a stay, and from all parts of such order, and

(3) the Order, Judgment and Decree, filed January 23, 1964 herein, dismissing this action, and from all parts of such Order, Judgment and Decree.

/s/ William Leighton
Plaintiff pro se
249 West 11th Street
New York 14, N. Y.

Dated: New York, New York
February 20, 1964

Opinion of Sugarman, *D.J.*

Tr. 287-306

(Caption) Civil Action No. 63-Civ-2924

#29713
U.S.D.C., S.D.N.Y.
Filed: March 2, 1964

Sugarman, *D.J.*

On October 8, 1963 plaintiff William Leighton, *pro se*, filed a confusing document labeled a "complaint" against defendants Paramount Pictures Corporation, Barney Balaban, Edwin L. Weisl, and Paul E. Manheim, alleging *inter alia*:

> 6. (a) Plaintiff brings this action (i) individually on behalf of himself as a shareholder of Paramount; (ii) representatively on behalf of all shareholders similarly situated; (iii) derivatively on behalf of Paramount".

(Cf. *Willheim* v. *Murchison*, 206 F. Supp. 733 (S. D. N. Y., 1962), appeal dismissed, 312 F. 2d 399 (2d Cir. 1963).

This rambling admixture of fact, evidence, argument and citation of statutes and cases appears to state:

(1) a claim of waste and dissipation of corporate assets involved in the payment of expense allowances and fees to corporate officers and directors;

(2) a claim of breach of fiduciary obligations on the part of two of the directors relating to the purchase by Paramount of its own common stock on the open market, as disclosed to the stockholders; and

(3) a claim of conspiracy to defraud the corporation in the collusive instigation of a recent stockholders' suit in the New York State Supreme Court.

It seems that the "First Count" seeks relief on behalf of the corporate defendant and its shareholders against the individual defendants Balaban and Weisl—in the form of money judgments for sums allegedly paid by the corporate defendant to defendants Balaban and Weisl, injunction against future payments without prior approval of stockholders, appointment of a receiver of the corporate defendant, declaration of invalidity of any contracts pursuant to which payments had been made: that the "Second Count" seeks discovery of documents of, or in the alternative the appointment of a receiver for, the corporate defendant, and the taking of depositions of the individual defendants; and that the "Third Count" seeks a declaration of invalidity of certain releases from the corporate defendant to the individual defendants, a further money judgment on behalf of the corporate defendant against the defendant Balaban and judgment for the plaintiff against the individual defendants for one million dollars.

On October 29, 1963 the defendants procured an order from Judge Murphy that the plaintiff show cause on November 4, 1963 why he should not post security for expenses under section 627 of the Business Corporation Law of New York and for costs under Civil Rule 2 of this court and for a stay of further proceedings by the plaintiff until such security be posted by him. Judge Murphy stayed further proceedings until determination of the motion.

On the same day (October 29, 1963) the plaintiff served on all defendants by mail a motion returnable November 12, 1963 for a preliminary injunction, disqualification of individual defendants' counsel, for the appointment of a receiver of the defendant corporation and other relief.

When this motion came on before Judge Croake on November 12, 1963 it was stricken from the calendar without prejudice to a renewal after decision of the defendants' earlier motion for security, then pending before Judge Croake since November 4, 1963.

On November 18, 1963 Judge Croake filed his decision of the defendants' motion granting security for costs only under Civil Rule 2 and a stay. The entry of the order directed to be entered by Judge Croake in his said decision was deferred pending a determination of plaintiff's ultimately unsuccessful petition to the Court of Appeals for a writ of mandamus and prohibition against Judges Murphy and Croake.

On December 23, 1963 Judge Croake filed an order on the November 18, 1963 decision which required the plaintiff to deposit security of $2,000 (pursuant to Civil Rule 2 of this court), which order also stayed "all proceedings on the part of the plaintiff" until the filing of the security but "without prejudice to plaintiff's right to file a motion in the Motion Part of this Court to vacate such stay". This order also provided that upon proper proof that the security had not been posted within fifteen days, an order dismissing the plaintiff's action was to be entered.

On December 26, 1963 plaintiff procured an order from Judge Feinberg that the defendants show cause on January 7, 1964 (a) why the stay of proceedings by plaintiff should not be vacated, (b) for a default judgment against the defendants, or in the alternative (c) restoring the plaintiff's earlier motion (stricken on November 12, 1963 as aforesaid) for a preliminary injunction, disqualification of individual defendants' counsel, the appointment of a receiver of the corporate defendant and other relief.

On December 27, 1963 the plaintiff was personally served with a copy of Judge Croake's order of December 23, 1963 with notice of entry.

On December 29, 1963 the plaintiff sought to have Judge Croake resettle his order of December 23, 1963 to allow for an interlocutory appeal therefrom (28 U. S. C. 1292(b)). This application was denied by Judge Croake by an order entered January 8, 1964.

On January 7, 1964 Judge Bonsal (before whom Judge Feinberg's order to show cause of December 26, 1963 came on for hearing) referred plaintiff's said motion to Judge Croake.

On January 10, 1964 Judge Croake orally extended to January 14, 1964 the plaintiff's time to post the security required by the order of December 23, 1963.

On January 22, 1964, four things happened: (1) the plaintiff filed a notice of appeal from Judge Croake's order of December 23, 1963; (2) Judge Croake filed an order denying the plaintiff's motion (referred to him by Judge Bonsal on January 7, 1964 as aforesaid) to vacate the stay and for a default judgment, which order also denied plaintiff's alternative motion to restore his earlier motion (stricken on November 12, 1963 as aforesaid) for preliminary injunction, disqualification of individual defendants' counsel, the appointment of a receiver and other relief, as "being in violation of the aforesaid stay"; (3) plaintiff served a notice of motion returnable February 4, 1964 to vacate the order of December 23, 1963 as having been procured by the purported fraud of the individual defendants' counsel upon the court, and for other relief hereinafter discussed, which is one of the motions presently before me for

determination; and (4) plaintiff sought to procure from Judge Edelstein an order that the defendants be stayed, pending determination of plaintiff's application returnable February 4, 1964, from entering judgment for his failure to post security, which Judge Edelstein declined to grant but referred to Judge Croake, who forthwith denied the application and entered an order to that effect.

On January 23, 1964, Judge Croake signed, and the clerk entered, a judgment dismissing the plaintiff's complaint for failure to post the security of $2,000 pursuant to the order of December 23, 1963, such dismissal being without prejudice, however, to the rights of any of the members of the class on whose behalf the suit was purportedly brought, except the named plaintiff William Leighton.

On January 31, 1964 Judge Edelstein granted the defendants an order that the plaintiff show cause, also on February 4, 1964, why (1) the plaintiff William Leighton should not be punished for contempt for violating the provision in Judge Croake's order of December 23, 1963, staying proceedings by the plaintiff until the security was deposited by him, (2) the plaintiff William Leighton should not be perpetually enjoined and restrained from continuing, instituting or prosecuting without prior leave of court this or any other legal proceedings in any court against any of the defendants herein or against any judge who has participated in any of the proceedings herein or against any counsel for any of the parties; and (3) there should not be awarded to the defendants reasonable attorneys' fees to be paid by the plaintiff William Leighton. This is the second motion presently before me for resolution.

I.

The Plaintiff's Motion (#11 of February 4, 1963) to Vacate Judge Croake's Order of December 23, 1963 "and for Other Relief".

This motion seeks (a) the vacatur of the order of December 23, 1963 under F. R. Civ. P. 60(b)(3) which empowers the court to relieve a party from a final judgment or order because of the fraud, misrepresentation, or other misconduct of an adverse party; (b) that "all pleadings, memoranda of law, affidavits, motions and other papers filed in this action by the defendants up to and including January 7, 1964" be stricken under F. R. Civ. P. 11 which allows for the striking of a *pleading* under certain conditions; and (c) that there be referred "to the Chief Judge of the Court the matter of the practice of law in this case by Mark Daly Geraghty" also under F. R. Civ. P. 11 and under General Rule 5(b)(4) of this court, the latter of which governs unauthorized practice in this court. Alternative relief by way of vacatur of the judgment of dismissal entered January 23, 1964 as aforesaid is sought if such judgment shall have been entered (this alternative was anticipatory because when the motion was made on January 22, 1964 the judgment of dismissal had not yet been entered).

All of the relief sought by plaintiff in his motion is based solely on the facts: (a) that the name of Mark Daly Geraghty, an attorney then admitted to the bar of the State of New York and employed by the law firm representing the individual defendants (who was not admitted to the bar of this court until January 7, 1964) was appended to the memorandum of law submitted by said individual defen-

dants in support of the motion for security argued before Judge Croake on November 4, 1963, together with the names of two other lawyers in that firm duly admitted to the bar of this court since April 1953 and April 1963 respectively and (b) that Mr. Geraghty upon the call of the motion calendar on November 4, 1963 answered that counsel for said individual defendants was ready for argument which was later made by one of the duly admitted attorneys and that Mr. Geraghty accepted from plaintiff in the courtroom that day at the Judge's direction, service of plaintiff's papers in opposition to the motion for security.

It is difficult to conceive a more flimsy basis for the relief sought by the plaintiff. Even if there were a shadow of substance to the *nugae* which laintiff offers against counsel for the individual defendants, it ignores the presence throughout every phase of this litigation of the corporate defendant, for whose benefit the security was ordered and whose counsel, a member of the bar of this court since June 1941, cannot be charged with participation in the "fraud".

The very statement of the trivia constituting plaintiff's contentions requires that his motion be and it is in all respects denied.

II.

THE DEFENDANTS' MOTION (#38 OF FEBRUARY 4, 1964) THAT PLAINTIFF (A) BE PUNISHED FOR CONTEMPT FOR VIOLATING THE STAY IN THE ORDER OF DECEMBER 23, 1963; (B) BE PERPETUALLY ENJOINED FROM FURTHER PROCEEDING IN THIS OR ANY OTHER COURT AGAINST DEFENDANTS, JUDGES, COUNSEL FOR PARTIES; AND (C) PAY DEFENDANTS' REASONABLE COUNSEL FEES.

A.

The defendants' motion seeks an order that "plaintiff be judged in contempt for violating the stays of this Court."

The first of the "stays" referred to is that contained in the order to show cause granted by Judge Murphy on October 29, 1963, returnable November 4, 1963, which "ORDERED that pending the hearing and determination of this motion, all proceedings herein be stayed". That order to show cause was personally served on plaintiff on October 31, 1963. Judge Croake heard argument of that motion on November 4, 1963 and filed his determination thereof on November 18, 1963. The only action taken by plaintiff in the suit between October 29 and November 18, 1963, was the mailing of his notice of motion for a preliminary injunction, a receiver, disqualification of the attorneys for the individual defendants and other relief, on October 29, 1963, two days before he was personally served with a copy of Judge Murphy's order. In any event, Judge Croake struck the motion on November 12, 1963 without prejudice to a renewal thereof after he decided the defendants' motion for security, previously argued before him on November 4, 1963. On these facts I fail to discern any contuma-

cious conduct on plaintiff's part respecting the stay granted by Judge Murphy on October 29, 1963, which expired by its own language on November 18, 1963 when Judge Croake filed his decision determining that motion.

No different result would obtain even if it be said that the defendants' motion for security was not "determined" until the entry of Judge Croake's order of December 23, 1963, since defendants' moving papers indicate that the only proceedings prosecuted by plaintiff between November 18, 1963 and December 23, 1963 were the proceedings in the Court of Appeals whereby plaintiff attempted, albeit without success, to test, by petition for a writ of mandamus and prohibition the validity of the stay granted by Judge Murphy, the alleged violation of which is the basis of this part of the relief now sought by defendants.

Where, as here, the validity of a stay in an order thought to be non-appealable (cf. *Phelps* v. *Burnham*, 327 F. 2d 812 (2d Cir. Feb. 13, 1964)) is brought into question by a motion in the Court of Appeals for a writ of mandamus or prohibition, it would be absurd to hold that such attempt is itself a contemptuous violation of the very order being challenged. Defendants' motion to punish plaintiff for violating the stay in Judge Murphy's order to show cause of October 29, 1963 is denied.

The second of the "stays" referred to is that contained in Judge Croake's order of December 23, 1963 which "ORDERED, that until the filing of the security aforesaid, all proceedings on the part of the plaintiff are stayed, without prejudice to plaintiff's right to file a motion in the Motion Part of this Court to vacate such stay". That order was not served upon plaintiff until December 27, 1963.

Defendants present two instances of alleged violations of that stay by plaintiff since December 27, 1963. The first is an unsuccessful application made by plaintiff on January

15, 1964 to the Court of Appeals to stay the dismissal of his complaint and for a rehearing of his earlier unsuccessful application for a writ of mandamus or prohibition against Judge Croake (which had been coupled with plaintiff's application for a like writ against Judge Murphy) but upon the new grounds of the same "fraud" constituting the basis of plaintiff's companion motion, herein denied *supra*. I can read this motion as no more than an attempt on plaintiff's part to prevent the implementation, by a judgment of dismissal of his complaint, of the order of December 23, 1963 and thus an effort, again unsuccessful, to attack the validity of the stay in that order. As such it is indistinguishable from plaintiff's kindred attempt to vitiate the stay in Judge Murphy's order.

Accordingly, defendants' motion to punish plaintiff for violating the stay in Judge Croake's order of December 23, 1963 by moving in the Court of Appeals to stay the dismissal of his complaint and for a rehearing on his petition for a writ of mandamus and prohibition directed to Judge Croake is denied.

The second alleged instance of violation by plaintiff of the stay in the order of December 23, 1963 is the plaintiff's motion (#11 of February 4, 1964) hereinabove denied. There plaintiff sought much more than merely the vacatur of the order of December 23, 1963 or the judgment of dismissal based thereon. Whether properly or not, he sought the striking of "all pleadings, memoranda of law, affidavits, motions and other papers filed in this action by the defendants up to and including January 7, 1964"; a reference to the Chief Judge of plaintiff's charges allegedly warranting disciplinary proceedings against a member of the bar of this court: and an order protecting him "from abuse of process by the defendants".

After plaintiff's default in posting the security by the extended date of January 14, 1964 he had only one avenue of relief open to him—"a motion in the Motion Part of this Court to vacate such stay".

Having deliberately chosen by seeking entirely unrelated relief, to flout the restraint imposed upon him for failure to comply with the requirement that he post security, he did so at his own peril.

The defendants' motion to punish plaintiff for civil contempt in violating the stay in Judge Croake's order of December 23, 1963 by moving, by his notice of motion of January 22, 1964 (motion #11 of February 4, 1964) for relief other than to vacate the stay in said order, is granted.

Plaintiff is fined the sum of $800 to be paid to the clerk of this court within ten days from the date of the service upon him of a copy of the order to be entered hereon with notice of entry, otherwise plaintiff to be committed to the custody of the Attorney General to be imprisoned until the fine is paid or plaintiff is otherwise discharged according to law.

The clerk of this court upon receipt of said fine shall pay the same over to the moving defendants as follows: $400 to the corporate defendant and $400 to the individual defendants jointly, as reimbursement to the defendants for their expenses in resisting plaintiff's motion (#11 of February 4, 1964) hereinabove denied.

Plaintiff's demand for a jury trial of his contempt is denied. *United States* v. *Onan*, 190 F. 2d 1 (8th Cir. 1951), *cert. denied*, 342 U. S. 869 (1951).

B.

The defendants' motion next seeks an order "perpetually enjoining and restraining the plaintiff . . . from continuing, instituting or prosecuting, without prior leave of court,

this or any other legal proceeding in any court against any of the defendants herein or against any judge who has participated in any of the proceedings herein or against any counsel for any of the parties".

Defendants cite *Rudnicki* v. *McCormack*, 210 F. Supp. 905 (R. I. and Mass., 1962), appeal dismissed, 372 U. S. 226 (1963), as authority for the sweeping restraint which they seek. That case falls far short of achieving the goal which defendants claim for it.

The decision of Judge Gignoux first affirmatively concludes, on defendants' motion therefor, that the complaints failed to state claims under the Civil Rights Act. In the case at bar the sufficiency of the complaint has not been tested or for that matter even briefed by the parties.

Further, the facts in *Rudnicki* demonstrated an appalling abuse of judicial process far more aggravated than anything set forth by defendants here. If the present suit is merely the rehash of matters heretofore litigated by the parties, the affirmative defense of res judicata or any other matter constituting an avoidance may be availed of. F. R. Civ. P. 8(c).

Finally, the limit of the restraint in *Rudnicki* was as to actions "against any state or federal judge, officer or employee for actions taken in the course of their official duties as such judge, officer or employee", a far less inclusive orbit than that here proposed by defendants. While this court has its share of *pro se* litigants who sue judges for ruling against them, this plaintiff's attempt to mandamus or prohibit Judges Murphy and Croake as hereinabove recounted does not yet put him in that class.

While it may be that plaintiff, since May 1960 when he first acquired .0003% of the corporate defendant's stock, has plagued defendants and the Securities and Exchange Commission with demands and accusations and has brought

and tried to intervene in lawsuits against them, defendants have not persuaded me that I have the power upon the facts disclosed herein to gag plaintiff as they request.

This branch of defendants' motion is denied.

C.

The defendants' motion finally seeks an order "awarding reasonable attorneys' fees in favor of defendants to be paid by plaintiff".

Every one of the cases cited by defendants[1] in support of this branch of their motion involved an allowance of counsel fees after trial or a reservation of the question of an allowance until after trial and in either instance only upon a determination that the claim made or defense interposed was unfounded or maintained in bad faith, vexatiously, wantonly or for oppressive reasons.

The defendants' *ipse dixit* at this stage of the case of plaintiff's motives in bringing the suit are insufficient upon which to order the assessment demanded.

This branch of defendants' motion is denied.

Settle a separate order on plaintiff's motion and a separate order on defendants' motion in conformity with this decision.

/s/ SIDNEY SUGARMAN
United States District Judge

Dated: New York, New York
February 27, 1964

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[1] Kansas City Southern Ry. Co. v. Guardian Trust Co., et al., 281 U.S. 1 (1930); Rolax v. Atlantic Coast Line Ry. Co., 186 F. 2d 473 (4th Cir. 1951); Gasan v. Vadsco Sales Corp., 6 F. Supp. 568 (E.D.N.Y. 1934).

Order Denying Plaintiff's Motion

Tr. 310-311

(*Caption*) Civil Action No. 63-Civ-2924

U.S.D.C., S.D.N.Y.
Filed: March 11, 1964

Plaintiff *pro se* William Leighton, having moved this Court by notice of motion dated January 22, 1964 for an order vacating, pursuant to Rule 60(b)(3) F. R. C. P., an order of the Honorable Thomas F. Croake, dated December 23, 1963, an order pursuant to Rule 11 F. R. C. P. striking all pleadings, memoranda of law, affidavits, motions and other papers filed in this action by defendants up to and including January 7, 1964 and an order pursuant to Rule 11 F. R. C. P. and General Rules 5(b)(4) of the General Rules of the United States District Court for the Southern District of New York, referring to the Chief Judge of the Court the matter of the practice of law in this case by Mark Daly Geraghty,

Now, upon reading and filing of said notice of motion, dated January 22, 1964, * * * and due deliberation having been had by the Court and a decision having been rendered by the Court on February 27, 1964,

Now, on motion of Messrs. Simpson Thacher & Bartlett and Leonard Kaufman, Esq., it is

ORDERED that said motion be and the same hereby is denied in all respects with prejudice.

/s/ SIDNEY SUGARMAN
U.S.D.J.

Dated: New York, N. Y.
March 11, 1964

Order Adjudging Plaintiff in Contempt

Tr. 313-315

(CAPTION)

U.S.D.C., S.D.N.Y.
Filed: March 11, 1964

Defendants Paramount Pictures Corporation, Barney Balaban, Edwin L. Weisl and Paul E. Manheim, having moved this Court by order to show cause dated January 31, 1964, for an order, among other things, holding plaintiff William Leighton in contempt of court because of his misconduct in violating the provisions of the order of the Honorable Thomas F. Croake, made on December 23, 1963, staying all proceedings on the part of plaintiff until the filing of security as specified in said order,

Now, upon reading and filing of said order to show cause, dated January 31, 1964, * * * and due deliberation having been had by the Court and a decision having been rendered by the Court on February 27, 1964 containing the Court's findings of fact and conclusions of law,

Now, on motion of Messrs. Simpson Thacher & Bartlett and Leonard Kaufman, it is

ORDERED that the said William Leighton is adjudged to be guilty of contempt of this Court in that he violated the stay contained in the order of Judge Croake entered on December 23, 1963 by moving by his notice of motion dated January 22, 1964 (Motion No. 11 of February 4, 1964) for relief other than to vacate the stay in said order; and it is further

ORDERED that William Leighton be and is fined the sum of $800.00 to be paid to the Clerk of the United States District Court for the Southern District of New York in Room 601 within ten (10) days from the date of the service upon him of a copy of this order with notice of entry thereof; and it is further

ORDERED that the Clerk of this Court upon receipt of said fine shall pay the sum over to the moving defendants as follows: $400.00 to Paramount Pictures Corporation and $400.00 to Barney Balaban, Edwin L. Weisl and Paul E. Manheim jointly, as reimbursement to the defendants for their expenses in resisting plaintiff's motion (No. 11 of February 4, 1964); and it is further

ORDERED that if the plaintiff fails to pay the said fine of $800.00 in the manner and within the time provided for in this Order, the United States Marshal for the Southern District of New York is hereby directed to arrest William Leighton and commit him to the custody of the Attorney General of the United States, and said William Leighton is to be imprisoned until such time as the fine hereinabove provided for is paid or said William Leighton is otherwise discharged according to law; and it is further

ORDERED that except as hereinabove ordered the motion is denied.

/s/ SIDNEY SUGARMAN
U.S.D.J.

Dated: New York, N. Y.
March 11, 1964

Notice of Appeal From Order

Tr. 323

(CAPTION)

U.S.D.C., S.D.N.Y.
Filed: March 20, 1964

Notice is hereby given that plaintiff William Leighton hereby appeals to the United States Court of Appeals for the Second Circuit from

(a) the Order, filed herein on March 11, 1964, denying plaintiff's motion under F. R. Civ. P. 60(b)(3) and other relief, and from all parts of such Order, and

(b) the further Order, filed herein on March 11, 1964, adjudging plaintiff to be guilty of contempt of this Court, and from all parts of such Order.

/s/ WILLIAM LEIGHTON
Plaintiff pro se
249 West 11th Street
New York 14, N. Y.

Dated: New York, New York
March 20, 1964

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 14—September Term, 1964.

(Argued September 24, 1964 Decided January 12, 1965.)

Docket No. 28831

WILLIAM LEIGHTON,

Plaintiff-Appellant,

—v.—

PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN WEISL and PAUL E. MANHEIM,

Defendants-Appellees.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeal from a series of orders in the District Court for the Southern District of New York requiring plaintiff to post security of $2,000 and staying further proceedings on his part until security was posted; Thomas F. Croake, *Judge*, December 23, 1963; denying plaintiff's motions to vacate the stay, for entry of default judgment against defendants, to strike defendants' defenses for misconduct of counsel, for a preliminary injunction and for the appointment of a temporary receiver for the corporate defendant;

Thomas F. Croake, *Judge*, February 4, 1964; and adjudging plaintiff in contempt for failure to comply with the terms of the stay issued by Judge Croake, Sidney Sugarman, *Judge*, March 11, 1964.

Affirmed.

WILLIAM LEIGHTON, *plaintiff-appellant pro se.*

LEONARD KAUFMAN, New York, New York, *for Defendant-Appellee, Paramount Pictures Corporation.*

WHITNEY NORTH SEYMOUR, JR., New York, New York (Simpson, Thacher & Bartlett, New York, New York), *for Defendants-Appellees, Barney Balaban, Edwin L. Weisl and Paul E. Manheim.*

MOORE, *Circuit Judge*:

On October 8, 1963, Leighton (appellant) began a shareholder's derivative action by filing a vague and conclusory complaint which appeared to charge that the individual defendants, directors of Paramount Pictures Corporation, wasted corporate assets and plundered the corporate treasury. Leighton requested that various sums paid by Paramount be recovered from the individual defendants, that a receiver be appointed for Paramount, that various contracts to which Paramount was a party be cancelled, and that an injunction be issued against further payments by it without the permission of the stockholders. Jurisdiction was based on the Securities and Exchange Act of 1934, 15 U. S. C. §78aa, and "the postal statutes." 28 U. S. C. §1339.

Leighton argues that a variety of errors was committed in the decisions on the various aspects of this litigation as it proceeded in the trial courts. Assuming *arguendo* that certain of the orders appealed from were appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U. S. 541 (1949), we find no merit in any of Leighton's contentions.

On December 23, 1963, Judge Croake ordered Leighton to post $2,000 as security for expenses pursuant to Rule 2, Civil Rules for the Southern and Eastern Districts.[1] This order also stayed "all proceedings on the part of the plaintiff" until security was posted but "without prejudice" to Leighton's right to file a motion to vacate the stay.

Rule 2 clearly empowered the District Court to compel security for costs in this derivative suit. This Rule does not attempt, contrary to the direction of Fed. R. Civ. P. 83, to avoid the procedural requirements incident to temporary injunctions issued under Fed. R. Civ. P. 65, but serves only to implement a limited grant of judicial control over the administration of a lawsuit. A temporary injunction, on the other hand, preserves the entire status quo between the parties and often serves as the equivalent of an adjudication of the merits.

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[1] *Rule 2—Security for Costs*

The court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the court may make such orders in regard to non-compliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

Nor did the imposition of the stay and security requirement before the parties joined issue constitute an abuse of judicial discretion. Security may be required and the order enforced even where a plaintiff's claim has some merit. *Leslie One-Stop in Pennsylvania Inc.* v. *Audiofidelity Inc.*, 33 F. R. D. 16 (S. D. N. Y. 1963). Leighton's status as a *pro se* litigant in no way of itself impugns the character of this litigation but under Rule 2 a court may take all the pertinent circumstances into account including the conduct of the litigants and the background and purpose of the litigation. *Miller* v. *Town of Suffield*, 249 F. 2d 16 (2d Cir. 1957), *cert. denied*, 356 U. S. 978 (1958). Here Leighton was an habitual *pro se* litigant whose claims were often conclusory and lacking in legal merit. The amount of security required is relatively modest and Leighton has failed to show that he would be financially unable to post the required amount. The security requirement and stay thus represent reasonable measures designed to further the effective administration of this suit and do not unduly prejudice Leighton in the pursuit of his claim. *Farmer* v. *Arabian Amer. Oil Co.*, 285 F. 2d 720 (2d Cir.), *cert. denied*, 364 U. S. 824 (1960); *Rockaway Pix Theater Inc.* v. *Continental Distrib. Inc.*, 7 Fed. Rules Serv. 2d 83, 611, Case 2 (E. D. N. Y. 1963).

On March 2, 1964, Leighton was held in contempt of the stay by Judge Sugarman. 63 Civ. 2924, S. D. N. Y. This contempt citation grew out of a motion made by Leighton on January 22, 1964, to strike all defenses "filed in this action by the defendants up to and including" January 7th because of the alleged misconduct of the individual defendants' counsel in permitting an attorney not admitted to the Bar of the District Court to participate in the prepara-

tion of their briefs. On the merits this contention is insubstantial because counsel could have been admitted *pro hac vice,* since his participation in the case beyond his research function seems to have been minimal and since the motion ignores the continuous participation in the case of the corporate defendant's counsel. In any event, as Judge Sugarman observed, Leighton disobeyed the express mandate of the stay by his motion because the relief requested went far beyond mere vacatur of the security and stay order of December 23, 1963. It is axiomatic that a court order must be obeyed, even assuming its invalidity, until it is properly set aside. *United States* v. *U. M. W.*, 330 U. S. 258, 289-295 (1947).

The remainder of Leighton's arguments have been considered but do not require discussion.

Affirmed.